



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 64 OF 2014**

**SAMUEL OJWANG JUMA.....CLAIMANT/APPLICANT**

**VERSUS**

**SAPHIRE COLLECTIONS LIMITED.....RESPONDENT**

**RULING**

1. This ruling relates to the claimant's Notice of Motion dated 25.7.2019 brought under section 3 & 3A of the Civil Procedure Act and Rule 22 Rule 35 of the Civil Procedure Rules. The motion seeks the following orders:-

- a. That Dilip Raichand Gudka and/or Aparna Dilip Gudka, both directors of respondent/judgment-debtor be orally examined as to whether the judgment-debtor has any and/or what property and/or means of satisfying the decree herein;
- b. That the court make orders for the attendance in court and examination of Dilip Raichand Gudka and/or Aparna Dilip Gudka, both directors of the defendant/respondent for production of any books of accounts or documents, for purposes of satisfying the decree herein.
- c. That in default of the said directors complying with the above order, this Honourable Court be pleased to order that the said directors beheld personally liable to pay the plaintiff/applicant the decretal sum and costs herein in the sum of Kshs. 9,072,075.00[sic] plus accruing interest.

2. The motion is premised on the grounds set out in its face and is supported by the affidavit sworn by the claimant on 25.7.2019. The thrust of the application is that the respondent closed shop on 1.2.2019 after the judgment/decreed was passed against it in order to fraudulently frustrate execution of the decree. Further, the applicant contended that, on 26.10.2018, the respondent proposed to settle the decretal sum by monthly instalments of Kshs 30,000 plus an initial payment of kshs. 50,000, but he did not pay anything after Raili Enterprises brought Objection proceedings contending that the proclaimed goods belonged to it. According to the claimant the decretal sum plus interest was Kshs.403, 906.78 as at 15.2.2019.

3. The respondent has opposed the motion by the affidavit sworn by Dilip Raichand Gudka on 17.9.2019 in which he contended that the respondent closed shop at the end of 2018 due to economic hardship after performing poorly for a long time. Further, he contended that the respondent has no assets or money at all with which to settle the decree of the court or any other debt and denied that the closure was fraudulent or meant to avoid payment of the decretal sum.

4. By the ruling rendered on 17.1.2020, I granted order (a) and (b) and directed that order (c), namely, lifting of the corporate veil would be determined after examination of the respondent's Directors by the claimant/decreed-holder. The examination was done on 4.3.2021 when only one Director, Mr. Dilip Gudka attended Court.

5. Mr. Gudka admitted being aware of the judgment debt of kshs.403,966.78 against the respondent as at 5.2.2019. He further admitted that in October 2018 he proposed to pay the judgment debt by instalments but he paid nothing contending that the company had been performing poorly for a long time. He confirmed that he did not bring to court books of Accounts for the company but had availed Financial Statement for 2018 and a bank Statement.

6. He contended that the company closed shop on 31.12.2018 after the Land Lord sent Auctioneers to remove the company from the business premises. However, he confirmed that the company had not been wound up. He contended that in 2018, the company made kshs.3000, 000 and spent most of it on operation expenses and banked only a small amount. He admitted that there are records of the income and expenses in the form of vouchers. He contended that he had 7 employees for whom he was paying Kshs. 400 as NSSF contributions.

7. He admitted the respondent has Sewing Machines and Furniture which it gave to Raili Enterprises, a partnership in which he is a partner.

He further admitted that the value of the respondent's assets according to the Financial Statement for 2018 was Kshs. 938,949 while the stock value was Kshs. 122,350. Again he admitted that the Statement of Directors Responsibility in the Financial Statement confirmed that there was nothing to show that the company would not operate as a going concern for the following 12 months.

8. He contended that the rent for the respondent's shop was Kshs.175,000 but he did not produce the lease agreement or any demand letter from the landlord. He contended that as at December 2018, the rent paid was Kshs 1,379,183 leaving a balance of Kshs.1, 127,845. He admitted that the in 2017, he did not have any rent arrears.

9. Finally, he contended that page 5 of the 2018 Financial Statement, showed that the respondent made a loss of Kshs.1, 107,641 in that year while in 2017 it made a loss of Kshs.268, 629.

10. After the examination of the Director, the counsel for both parties filed written submissions. The claimant submitted that he has established that this is a good case for the court to pierce the respondent's corporate veil and urged the court to give leave to execute the decree herein against directors of the respondent/judgment-debtor personally in default of payment of the judgment debt herein. He contended that both the character of the company and the nature of Director Mr. Dilip Gudka is a relevant feature.

11. To fortify, said submission he put reliance on **Jiang Nan Xiang v Cok Fas-St Company Limited [2018] eKLR, Arun .C. Sharma v Ashana Raikundalia & 5 others [2015] eKLR** and **Githunguri Dairy Farmers Co-operative Society v Ernie Campbell & Co. Ltd & another [2018] eKLR**.

12. On the other hand, the respondent submitted that the circumstances of this case do justify lifting of its corporate veil. It contended that the Director has tabled its Financial Statement for 2018 that shows that it had incurred loss since 2017. It argued that no fraud has been proved and maintained that it has all through acted in good faith to the extent of proposing to settle the decree by instalments. It put reliance on **Vihiga Farmers Co. Ltd v Nathan Indombelo [2018] eKLR**, and **Ephantus M. Kagomo & 6 others v Industrial Commercial Development Corporation [2012] eKLR**.

#### **Issues for determination**

13. There is no dispute that the decree of Kshs. 403,966.78 plus interest against the respondent has not been settled. There is further no dispute that execution of the decree by attachment of the respondent's assets has failed because none of her assets could be traced. Finally, it is common ground that the respondent has closed shop but has not been wound up. The issue for determination is whether the respondent's corporate veil should be lifted and its directors held personally liable to pay the decree herein.

#### **Lifting the corporate veil**

14. Since the decision of the English case of **Salomon & Salomon & Co. Ltd v Salomon [1897] A.C. 22 H.L.**, it is trite law that a company is a separate and distinct person from its shareholders and directors. However, over the time courts have developed principle or legal thresholds for disregarding or lifting the corporate veil so that the persons who control the company may be held personally liable to pay the company's debts.

15. The circumstances under which the corporate veil may be pierced were discussed in paragraph 90 of **Halsbury's Laws of England 4th Edition Volume 7 (1)** as follows:

**“Notwithstanding the effect of a company's incorporation, in some cases the court will ‘pierce the corporate veil’ in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced”.**

16. In **Jiang Nan Xiang v Cok Fas-St Company Limited [2018] eKLR**, the court lifted the veil against the Judgment-debtor and observed that:

**“ Having considered all the circumstances of this case, I am satisfied that the two directors having failed to produce the necessary records and/or documents of the judgment debtors Company, as required under Order 22 Rule 35 of the Civil Procedure Rules, and after having been accorded an opportunity to do the same, this is thus suitable for this Court to order and hereby do order that, the corporate veil in relation to the judgment debtor be lifted and the two directors be held personally liable to satisfy the decree in this matter. It is clear the decretal sum is not satisfied and the Directors have not acted in good faith to validate the decretal sum”**

17. Order 22 Rule 35 to provides that:

**“Where a decree is for payment of money, the decree-holder may apply to the court for an order that –**

**a. the judgment debtor;**

**b. In the case of a corporation, any officer thereof; or**

**c. Any other person, be orally examined as to whether any or what debts are owing to the judgment-debtor, and whether the judgment-debtor has any and what property or means of satisfying the decree, and the court may make an order for the attendance and examination of such judgment debtor or officer, or other person, and for the production of any books or documents.”**

18. In this case, the two directors of the respondent were given opportunity to present the company’s records of income and expenditure to the court and face examination on the company’s means of satisfying the decree herein. Only Mr. Dilip Gudka attended court for examination and admitted that there were indeed records of income and expenditure but produced none.

19. He also admitted that assets valued at Kshs. 938,949 and the stock worth was Kshs. 122,350 were removed from the respondent’s shop and allegedly given out to Raili Enterprise, a Partnership business owned by Mr.Dilip Gudka and his family. That was done after the decree herein was passed and before satisfying the same.

20. Having considered the circumstances of this case, I am satisfied that the directors of the respondent removed the company’s assets from the shop to unknown place in order to frustrate execution of the decree herein. Further, I am satisfied that the said directors deliberately failed to produce the company’s records of income and expenditure in order to conceal from the court the respondent’s financial capacity to satisfy the decree herein.

21. Although Mr. Dilip Gudka produced the respondent’s Financial Statement (Audit Report) for the year 2018, the said report is not equal to records or books of account contemplated under Order 22 rule 35. If that was the case, the Rule would have just required the officers of a company to produce an Audit Report for the company.

22. It must be clear by now, that the said actions by the respondent’s Directors smacks of bad faith and that the corporate veil is being used as a mask to shield shareholders and directors of the respondent company from execution of the decree herein. Consequently, I allow the application because the justice of the case demands that the corporate veil of the respondent company be disregarded and lifted.

23. Accordingly I hereby order the two directors of the respondent company, Mr. Dilip Raichand Gudka and Aparna Dilip Gudka, to personally pay the claimant the decretal sum in this suit, being Kshs.403, 906.78 plus accrued interest. They are also condemned to pay the costs of the application to the claimant.

**DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY, 2021**

**ONESMUS MAKAU**

**JUDGE**

**ORDER**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this ruling has been delivered to the parties online via Google Teams with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**